

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs June 21, 2005

STATE OF TENNESSEE v. SERGIO F. CANO

Appeal from the Criminal Court for Davidson County
No. 2003-C-2208 Seth Norman, Judge

No. M2004-02639-CCA-R3-CD - Filed September 2, 2005

The defendant, Sergio F. Cano, was convicted of four counts of aggravated sexual battery. See Tenn. Code Ann. § 39-13-504(a)(4). The trial court ordered concurrent, Range I sentences of eleven years. In this appeal as of right, the defendant argues that the evidence was insufficient to support his convictions. The judgments of the trial court are affirmed.

Tenn. R. App. P. 3; Judgments of the Trial Court Affirmed

GARY R. WADE, P.J., delivered the opinion of the court, in which JOSEPH M. TIPTON and J.C. McLIN, JJ., joined.

William A. Lane, Murfreesboro, Tennessee, for the appellant, Sergio F. Cano.

Paul G. Summers, Attorney General & Reporter; Seth P. Kestner, Assistant Attorney General; and Brian Holmgren, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

In the winter and spring of 2002, the defendant shared a residence with the female victim, R.B.,¹ the victim's family, and the boyfriend of the victim's mother. The four counts of the indictment were the result of incidents that took place during that time period when the defendant allegedly fondled the genitals of R.B. On those occasions, the defendant rubbed the victim's genitals over her shorts while she was lying in her bed alongside her older sister, who was asleep. R.B. was nine years old at the time.

At trial, the victim testified that on one occasion the defendant removed her blankets, fondled her genitals over her shorts, and stopped only when the victim threatened to tell her mother.

¹It is the policy of this court not to reveal the names of children who are victims of sex crimes.

The victim revealed that on a second occasion, she unsuccessfully tried to awaken her sister, K.B.,² when the defendant would not stop touching her. The victim also remembered that on five or six other occasions, she asked the defendant to leave the room after he began to touch her inappropriately. The victim described the facts underlying the fourth count of the indictment as when she again tried to awaken her sister because the defendant was rubbing her genitals. Her sister awoke but only enough to say, “[L]eave me alone.” During direct examination, the victim identified the place she was touched by circling the genital region on a diagram of a young female. The victim testified that she eventually complained of the incidents to her sister and asked her to tell their mother.

On cross-examination, the victim acknowledged that she had previously been questioned about the incident, at which time she responded that she could not remember whether the defendant had touched her more than once. The victim also explained that she remembered telling a worker from the Department of Human Services that the defendant had touched her five to ten times. It was unclear from her testimony whether she recalled talking with Tanisha Dillard, an employee of the Department of Children Services, or having told her that the defendant had touched her during the daytime as well as at nighttime.

The victim’s older sister, K.B., testified that the defendant would sometimes sleep in the bedroom she shared with her sister and that on a couple of occasions they had switched positions on the bed at her sister’s request. She also recalled being suddenly awakened by the victim on a night the defendant was sleeping in their room. She remembered that she had responded, “[L]eave me alone.” K.B. testified that the victim eventually told her about the defendant’s misconduct and, at the victim’s request, she told their mother.

The victim’s mother, Michelle Black, testified that she and her daughters moved into a residence with her boyfriend and the defendant in February or March 2002 and that some two months later, they all moved into another residence on Aster Drive. She stated that she and her boyfriend shared a bedroom, her daughters shared a bedroom, and the defendant lived in his own bedroom. According to Ms. Black, she was aware that the defendant slept in her daughters’ room on two or three occasions and that he had explained that his bedroom was either too hot or too cold on those nights. She revealed that her daughter, K.B., first informed her of the defendant’s misconduct and on the next day, after Ms. Black confronted the defendant with the allegations, the defendant left the residence permanently. She testified that on that same day, she informed a case manager, who had been working with the family, of the improprieties and that the case manager contacted the proper authorities. On cross-examination, Ms. Black explained that she had trusted the defendant as a family friend and had not objected to the sleeping arrangements. She also admitted that R.B. had not alleged, until just before her testimony, that the defendant had touched her inappropriately during a daytime incident as well as the several occasions at night.

²Because the victim’s sister is also a minor, we will not disclose her identity.

Nashville Police Detective Charles Potter, who interviewed the defendant, testified that the defendant first claimed that he had gone into the victim's bedroom on only one occasion but later admitted having done so on several occasions. He remembered that the defendant initially stated that he had touched the victim only once and on her back but after being confronted with the victim's statement, admitted to having touched the victim on her "front parts" over her underwear. According to the detective, the defendant acknowledged touching her fewer than ten times and estimated five separate incidents for approximately ten minutes.

The defense rested without introducing any evidence.

On appeal, of course, the state is entitled to the strongest legitimate view of the evidence and all reasonable inferences which might be drawn therefrom. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). The credibility of the witnesses, the weight to be given their testimony, and the reconciliation of conflicts in the proof are matters entrusted to the jury as the trier of fact. Byrge v. State, 575 S.W.2d 292, 295 (Tenn. Crim. App. 1978). When the sufficiency of the evidence is challenged, the relevant question is whether, after reviewing the evidence in the light most favorable to the state, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Tenn. R. App. P. 13(e); State v. Williams, 657 S.W.2d 405, 410 (Tenn. 1983). Questions concerning the credibility of the witnesses, the weight and value of the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact. Liakas v. State, 199 Tenn. 298, 286 S.W.2d 856, 859 (1956). Because a verdict of guilt against a defendant removes the presumption of innocence and raises a presumption of guilt, the convicted criminal defendant bears the burden of showing that the evidence was legally insufficient to sustain a guilty verdict. State v. Evans, 838 S.W.2d 185, 191 (Tenn. 1992).

The statute defining the offense of aggravated sexual battery provides in pertinent part as follows:

(a) Aggravated sexual battery is unlawful sexual contact with a victim by the defendant or the defendant by a victim accompanied by any of the following circumstances:

* * *

(4) The victim is less than thirteen (13) years of age.

Tenn. Code Ann. § 39-13-504(a)(4) (2003). "'Sexual contact' includes the intentional touching of the victim's, the defendant's, or any other person's intimate parts, or the intentional touching of the clothing covering the immediate area of the victim's, the defendant's, or any other person's intimate parts, if that intentional touching can be reasonably construed as being for the purpose of sexual arousal or gratification." Tenn. Code Ann. § 39-13-501(6) (2003).

In our view, the evidence presented a classic jury question. The victim, who was less than thirteen years of age at the time of the offenses, testified that the defendant, while sleeping in the victim's bedroom, touched her genitals. According to the victim, this occurred several times. According to the detective, the defendant, after first denying improper contact, admitted to having

touched the victim's "front parts" on multiple occasions. The jury accredited the testimony of the victim, which was its prerogative. A rational trier of fact could also have found beyond a reasonable doubt that the defendant's conduct could "be reasonably construed as being for the purpose of sexual arousal or gratification." See Tenn. Code Ann. § 39-13-501(6) (2003). The verdict resolved the conflicts, if any, in the testimony in favor of the state. See State v. Summerall, 926 S.W.2d 272, 275 (Tenn. Crim. App. 1995).

Accordingly, the judgments of the trial court must be affirmed.

GARY R. WADE, PRESIDING JUDGE